

United States Department of the Interior
Office of Hearings and Appeals
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SOUTHERN INDIAN COUNCIL,)	IBIA 99-37-A
A CALIFORNIA NON-PROFIT)	
CORPORATTON,)	
APPELLANT)	
v.)	RECOMMENDED ORDER
)	GRANTING MOTION TO
)	DISMISS
MICHAEL TRUJILLO, DIRECTOR,)	
INDIAN HEALTH SERVICE, AND)	
MARGO KERRIGAN, DIRECTOR)	
CALIFORNIA AREA OFFICE,)	
INDIAN HEALTH SERVICE,)	
APPELLEES)	

Appellant, hereafter referred to as SIHC, filed an appeal from the decision of the Director of the California Area Office of the Indian Health Service, hereafter CAO, declining to find SIHC for fiscal year 1999 at the same level as FY 1998 funding under a self-determination contract (638 contract) with the CAO to provide medical services to the tribes comprising SIHC.

The foundational issue which appears to have been raised by the Appeal is whether by negotiation and agreement, SIHC and CAO had established the IHS "residual" to be \$1,700,000 for the purpose of determining the extent of the IHS allocation to SIHC to cover Programs, Functions, Services, and Activities (hereafter, PFSAs) for FY 1999 or whether the figure of \$2,458,400 should have been used, which CAO alleges is the actual residual. The figure \$1,700,000 had been used by SIHC and CAO commencing with negotiations in 1995. Based on the lower figure, SIHC would have received \$264,976 for PFSAs for FY 1999 and based on the higher figure, SIHC would have received \$238,700 for such activity. CAO declined to fund SIHC beyond the \$238,700 amount. It is noted that in its Appeal, SIHC does not challenge the accuracy of the \$2,458,400 figure; the thrust of the Appeal is that \$1,700,000 is the residual which had been established and that CAO could not fund for less than the funding made available for the previous year's contract in the absence of the elements set forth in 25 U.S.C. 450j-1(b), which SIHC alleges the CAO admits did not apply in the instant case. Obviously, these two issues are so interwoven that they must be addressed together, and, for reasons hereinafter stated, this Administrative Law Judge is not in a position to address them.

During a prehearing conference, the parties agreed to a schedule for filing prehearing pleadings. Thereafter, CAO filed a motion to dismiss the Appeal in which pleading CAO raised issues of estoppel and abatement, based on the premise that SIHC is a party to an action in the United States District Court in which the issue of SIHC funding, among many other issues, is addressed.

In its response to the CAO motion, SIHC counters that neither abatement nor estoppel are applicable; urges, in effect, that this forum has concurrent jurisdiction, and argues that the issues raised in the Court case did not reach the issue whether CAO and SIHC had established \$1,700,000 as the "residual" to be applied to SIHC funding. The position of SIHC is that the \$1,700,000 figure was negotiated as the residual. The position of CAO is that SIHC understood that at the time the negotiations were ongoing that the residual figure agreed to would be a temporary figure to be used until CAO completed a detailed study to determine what the residual should be, and that after such detailed study, CAO arrived at \$2,458,400 as the correct residual figure. This figure was used by CAO in determining the SIHC allocation for PFSA's for FY 1999 at an amount \$26,276 less than the FY 1998 allocation, and in CAO declining SIHC funding for FY 1999 by such amount.

In its Order granting a motion for summary judgment entered August 25, 1998, the United States District Court for the Northern District of California, made the following statements, findings, and rulings at pages 11 and 12 of the Order:

The California Area Office ("CAO") of IHS acted in a similar manner. Although the CAO initially estimated its residual to be \$1,700,000, see Declaration of Paul Redeagle ("Redeagle Decl."), __ 5, the CAO determined its residual to be \$2,458,400 after it completed its analysis of the residual. See AR Vol.III, Subpart D, Tab 30 (Residual Identification Table -- California Area Office); Redeagle Decl. at __ 7.

The Court accepts defendants' assertion that the \$1,700,000 figure represented a preliminary estimate of the CAO's residual amount and was subject to adjustment after the completion of appropriate analyses. The CAO reached agreements based on the preliminary figure of \$1,700,000, but those agreements required modification once the CAO determined the actual residual amount. The change in the residual amount was neither arbitrary nor capricious, but simply a completion of CAO's budgetary analysis. Consequently, the amount withheld as the residual is neither an abuse of discretion, nor otherwise arbitrary or capricious. Defendants are therefore entitled to summary judgment as to plaintiffs' first claim for relief.

The Court has brought within its province the issue as to whether the \$1,700,000 figure was intended as the permanent residual, as argued by SIHC, or as a temporary figure until the CAO could complete its study as to what the actual residual amount should be, and the Court has determined that issue. If this forum acceded to SIHC's request for discovery and a hearing based on whether the \$1,700,000 was negotiated as the permanent residual, it would be invading the province of the Court and, in effect, litigating an issue which the Court has made moot by its

decision. The proper avenue for the SIHC to take would be an appeal of the Court's decision that the \$ 1,700,000 figure was a temporary figure and not the residual on which future allocations to SIHC would be based.

Under 25 CFR 900.161, the Administrative Law Judge has the discretion to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. Upon review of the whole record, including the pleadings and supplementary materials submitted with such pleadings, and upon exercise of the discretion conferred by 25 CFR 900.161, this forum directs that the motion for dismissal filed by CAO be granted.

This forum issues only a recommended decision to grant the motion to dismiss because neither the Act nor the regulations implementing the Act, specifically invest the Administrative Law Judge with the authority to grant or deny, outright, a motion to dismiss. If this forum has only the authority to issue a recommended final decision, it does not see how it could have any greater authority to issue a final interim decision.

This administrative body directs that SIHC be extended the right to renew the administrative appeal should the ultimate decision in the federal court system be that the trial court erred in determining that the \$1,700,000 figure was a temporary figure and not the actual residual negotiated by SIHC and CAO. Toward such eventuality, it is recommended that CAO set aside \$26,276, and maintain such set aside during the journey of the Court's order through the federal court system or, in the alternative, develop a financial plan which would ensure the availability of such sum should the Court's ruling that the \$1,700,000 figure was not the residual established by SIHC and CAO be reversed.

Pursuant to 25 CFR 900.165, the parties are advised as follows:

Within 30 days from the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.165(b). An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC, 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

Dated MAR 17 1999

William E. Hammett
Administrative Law Judge